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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 147

HARRY PORTNOY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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HARRY PORTNOY,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Harry Portnoy, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on May 1, 1963.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 7, is not as yet reported.

Jurisdiction

The judgment of the court below was entered on May 1, 1963. It is set forth on page 104 of the certified copy of the Record Appendix and Proceedings in the court below, filed with this petition and is also printed in Appendix B hereto, *infra*, p. 12. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. Is an indictment, alleging an assault on a federal officer under 18 U.S.C. s. 111, fatally deficient if it fails to allege that the defendant knew that his victim was a federal officer engaged in the performance of his official duties?

II. If it is, does an indictment, which alleges that the acts complained of occurred while the victim "was engaged in the performance of his official duties and on account of the performance of his official duties," fairly apprise the defendant of all the elements of the offense with which he is charged and against which he has to defend?

Constitutional and Statutory Provisions Involved

The only statutory provision involved is 18 U.S.C. s. 111, which reads as follows:

> Assaulting, resisting, or impeding certain officers or employees—Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Statement of the Case

On May 11, 1962, a grand jury returned an indictment alleging that petitioner "on or about May 9, 1962, at a parking lot located on St. Botolph Street in Boston, Massachusetts, did forcibly assault, resist, oppose, impede, intimidate and interfere with United States Deputy Marshal William H. Baldwin, a person designated in Section 1114 of Title 18 of the United States Code, while said William H. Baldwin was engaged in the performance of his official duties and on account of the performance of his official duties, all in violation of Title 18, United States Code, Section 111." (R.[1] 3.)

Petitioner pleaded not guilty and seasonably moved to dismiss the indictment because of a failure to allege that petitioner knew, at the time of the alleged acts, that the victim (1) "was an officer of the United States" and (2) "was engaged in the performance of his official duties." (R. 1, 3-4.)

After a hearing, that motion was denied. (R. 1, 4.)

"At the trial the Government offered testimony that the defendant had virtually run over—with his automobile—a Deputy United States Marshal who had tried to serve him with a subpoena. There was evidence from which a jury could have properly concluded that the defendant had been made aware of the official status of the Deputy Marshal and that he had deliberately plunged his car forward—heedless of the possibility of bodily harm to the Mar-

[1] "R." refers to the Certified Copy of the Record Appendix and Proceedings in the court below.

shal—in order to avert being served." (Appendix A hereto, *infra*, p. 8.)

Petitioner was found guilty. He was sentenced to be imprisoned for a term of three months and to pay a fine of $1,000.00. The sentence was stayed pending appeal and petitioner filed seasonable notice of his appeal to the court below. (R. 2, 95-96.)

The court below affirmed the judgment of the district court. While recognizing the existence of a conflict among the federal courts [2], the court below avoided resolving the conflict by concluding that the italicized portion of the allegation in the indictment, "that the defendant assaulted the marshal while (he) was engaged in the performance of his official duties *and on account of the performance of his official duties*," was the same as an allegation that the defendant assaulted the marshal for the reason that he was performing official duties and, therefore, necessarily and fairly charged "the defendant's knowledge or awareness of the cloak of officiality with which his victim was garbed at the critical moment." (Appendix A hereto, *infra*, pp. 10-11.)

The court below stayed its mandate.

Reasons For Granting the Writ

I.

As indicated above and acknowledged by the court below, there is "a significant line of cases starting with *Pettibone* v. *United States*, 148 U.S. 197 (1893), holding that knowl-

[2] The court below noted, on the one hand, the holding of the Court of Appeals for the Fifth Circuit in *Bennett* v. *United States*, 285 F.2d 567, 570 (1960), that "scienter as to the official character of the victim, is not an essential element of this type of offense;" and, on the other, "a significant line of cases starting with *Pettibone* v. *United States*, 148 U.S. 197 (1893), holding that knowledge of the official character of the officer is an essential element of the offense charged, and an indictment which failed to allege this element is fatally defective." (Appendix A hereto, *infra*, pp. 9-10.)

edge of the official character of the officer is an essential element of the offense charged, and an indictment which failed to allege this element is fatally defective. See, e.g., *Sparks* v. *United States*, 90 F.2d 61 (6th Cir. 1937); *United States* v. *Miller*, 17 F.R.D. 486 (D.C. Vt. 1955)." See also *Henderson* v. *United States*, C.A. 4, 24 F.2d 811; *Hall* v. *United States*, C.A. 5, 235 F.2d 248; *Hargett* v. *United States*, C.A. 5, 183 F.2d 859, 864; *Anderson* v. *United States*, C.A. 6, 215 F.2d 84.

We believe that on logic that line of cases should be followed and that the conflict between them and *Bennett* v. *United States*, C.A. 5, 285 F.2d 567, 570-571, on which the Government relied, should be resolved. Not only is the determination of this difference important to prosecutions instituted under 18 U.S.C. s. 111, but it would, it seems to us, be of importance to the many prosecutions which are commenced under closely analogous sections of the Code. See, e.g., Sections 201, 206, 1501, 1503 and 2231 of Title 18.

II.

If, as we believe, scienter is an essential element of the crime involved in this case, then it follows that the requisite knowledge must be alleged " 'fully, directly, and expressly, without any uncertainty or ambiguity, . . .' *United States* v. *Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135." *Russell* v. *United States*, 369 U.S. 749, 765, 82 S. Ct. 1038, 1047-1048.

To say, as the court below did, that the allegation, which was obviously designed to follow the statute, that the acts complained of occurred while the marshal "was engaged in the performance of his official duties and on account of the performance of his official duties," fairly apprised the defendant that scienter was one of the essential elements of the offense with which he was charged, is to ignore the clear mandate of Rule 7(c) of the Federal Rules of Crimi-

nal Procedure[3] and the explicit teaching of *Russell* v. *United States*. For aught that appeared in this case, the grand jury might well have been under the impression, especially because this was the Government's position from the beginning,[4] that they could indict even though they were not convinced that petitioner knew that his victim was a government officer engaged on official business at the time of the assault. As pointed out in *Russell* v. *United States*, 369 U.S. at page 770, and 82 S. Ct. at page 1050, a defendant should not "be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] That rule requires the indictment to "be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[4] The Government had argued that scienter was not an essential element of the offense in the district court, when opposing petitioner's motion to dismiss the indictment, and in the court below (Brief for Appellee, pages 4-7).

Appendix A

United States Court of Appeals
For the First Circuit

No. 6067.

HARRY PORTNOY,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before HARTIGAN and ALDRICH, *Circuit Judges*,
and GIGNOUX, *District Judge*.

Manuel Katz, with whom *Paul T. Smith* and *Raymond J. Dowd* were on brief, for appellant.

William F. Looney, Jr., Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *Paul J. Redmond*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

May 1, 1963.

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment of the United States District Court for the District of Massachusetts following defendant's conviction by a jury on a one count indictment charging him with a violation of Title 18, U.S.C. § 111.

On May 11, 1962 a grand jury returned an indictment alleging that defendant "on or about May 9, 1962 at a parking lot located on St. Botolph Street in Boston, Massa-

chusetts, did forcibly assault, resist, oppose, impede, intimidate and interfere with United States Deputy Marshal William H. Baldwin, a person designated in Section 1114 of Title 18 of the United States Code while said William H. Baldwin was engaged in the performance of his official duties and on account of the performance of his official duties, all in violation of Title 18, United States Code, Section 111."

Defendant pleaded not guilty and seasonably moved to dismiss the indictment because of a failure to allege that defendant was aware, at the time of the alleged offense, that Baldwin (1) "was an officer of the United States" and (2) "was engaged in the performance of his official duties." This motion was denied.

The case proceeded to trial and following the close of the prosecution's opening statement—wherein the prosecutor alluded to no prospective proof that the defendant knew the official status of Baldwin—defendant moved for a judgment of acquittal. The trial judge denied this motion also.

At the trial the Government offered testimony that the defendant had virtually run over—with his automobile—a Deputy United States Marshal who had tried to serve him with a subpoena. There was evidence from which a jury could properly have concluded that the defendant had been made aware of the official status of the Deputy Marshal and that he had deliberately plunged his car forward—heedless of the possibility of bodily harm to the Marshal—in order to avert being served.

In this court, defendant raises three contentions. Initially he argues that the indictment was fatally defective because of the failure to allege that defendant knew that Baldwin was a government officer engaged in the performance of his official duties. Second, it is argued that the trial judge erred in denying defendant's motion for

judgment of acquittal following the Government's opening statement because of the prosecutor's failure to state that the Government would prove that Baldwin was a Government officer engaged in the performance of his official duties. Finally, defendant urges that the evidence is insufficient to sustain a conviction.

In our view there is no question that there was abundant evidence from which the jury properly could have found the defendant guilty as charged and, consequently, we pass quickly over the defendant's argument as to the sufficiency of the evidence.

The major issue posed by defendant is whether an indictment alleging an assault on a federal officer under 18 U.S.C. § 111, is deficient if it does not allege that the defendant was aware that his victim was a federal officer. The Government argues that scienter on the part of the defendant, as to the official character of the victim, is not an essential element of this type of offense. It argues that the gist of the offense resides in the fact that the defendant has engaged in a certain course of illegal conduct —*malum in se*— and the additional fact that the victim happens to be a federal officer is relevant only for jurisdictional purposes. In support of this argument, the Government relies largely on the recent decision of the United States Court of Appeals for the Fifth Circuit in *Bennett* v. *United States*, 285 F.2d 567, 570 (1960), which squarely sustains the position for which the Government here contends.

The defendant, on the other hand, while recognizing the fact that *Bennett* is highly apposite, attempts to discredit the result on the basis that the holding is out of consonance with a significant line of cases starting with *Pettibone* v. *United States*, 148 U.S. 197 (1893), holding that knowledge of the official character of the officer is an essential element of the offense charged, and an indictment which failed to

allege this element is fatally defective. See, *e.g.*, *Sparks* v. *United States*, 90 F.2d 61 (6th Cir. 1937); *United States* v. *Miller*, 17 F.R.D. 486 (D.C. Vt. 1955). Defendant further contends that the authority of *Bennett* is weakened by the fact that there the court failed even to mention its two prior rulings holding that scienter was an essential element of this type of offense. See, *Hall* v. *United States*, 235 F.2d 248 (5th Cir. 1956); *Hargett* v. *United States*, 183 F.2d 859 (5th Cir. 1950).

While it may be possible to reconcile these authorities, in our view, it is not essential for us to do so in the instant case. Rather, here we need not reach the question of whether an indictment which failed to allege scienter would be defective because in our view the present indictment did in fact fairly charge the defendant with knowledge of the marshal's official status.

It is a cardinal principle of our criminal law that an indictment is sufficient which apprises a defendant of the crime with which he is charged so as to enable him to prepare his defense and to plead judgment of acquittal or conviction as a plea to a subsequent prosecution for the same offense. *United States* v. *Cruikshank*, 92 U.S. 542 (1895); *United States* v. *Crummer*, 151 F.2d 958 (10th Cir. 1945); *United States* v. *Pope*, 189 F. Supp. 12 (S.D.N.Y. 1960).

An examination of Section 111 shows that it defines the instant offense as assault upon a federal officer "while engaged in *or on account of the performance of his official duties.*" (Emphasis supplied). Following the words of the statute, the indictment in this case charged that the defendant assaulted the marshal "while (he) was engaged in the performance of his official duties *and* on account of the performance of his official duties. . . ." We believe that an allegation averring that a defendant embarked upon a given course of conduct "on account of"—or for the reason

that—his victim was performing official duties must necessarily imply the defendant's knowledge or awareness of the cloak of officiality with which his victim was garbed at the critical moment. In other words, it is difficult for us to perceive how an assault could be made "on account of" the performance of the victim's official duties, without knowledge that the victim either was performing, or had performed official duties which were indeed the impelling motive for the assault. See, *Sparks* v. *United States*, *supra*; see also, *Parsons* v. *United States*, 189 F.2d 252, 253 (5th Cir. 1951).

In sum, we believe that the instant indictment fairly apprised the defendant of all the elements of the offense with which he was charged and against which he had to defend. In this day, more than this an accused may not ask. As was stated in *Parsons* v. *United States*, *supra*: "The cynically technical approach which formerly enshrouded the consideration of even the plainest and simplest indictment, and in many instances, made a mockery of simple justice, no longer govern their consideration." Id. at 253.

There remains the question of whether the trial judge erred in denying appellant's motion for judgment of acquittal following the Government's opening statement because of the prosecutor's asserted failure to state that the defendant knew that his victim was a federal officer.

We have carefully considered defendant's contention but believe that where the indictment alleges the elements of the offense and the evidence adduced at the trial touches these elements, the defendant cannot claim prejudicial error for failure of the trial judge to acquit on the basis of a prosecutor's opening statement.

Judgment will be entered affirming the judgment of the district court.

Appendix B

UNITED STATES COURT OF APPEALS.
FOR THE FIRST CIRCUIT

No. 6067.

HARRY PORTNOY,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT

May 1, 1963.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s). ROGER A. STINCHFIELD,
Clerk.